

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

TRENTON SILDACK, #255969,

Plaintiff,
v.
CORIZON HEALTH, INC., et al,

Defendants.

Case No: 2:11-cv-12939
Honorable: Denise Page Hood
Magistrate Judge: R. Steven Whalen

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**THE PHS DEFENDANTS' MOTION TO STRIKE TREATER WITNESSES
OR FOR AN ORDER ALLOWING THEIR DEPOSITIONS**

NOW COME the PHS Defendants, by and through their counsel, CHAPMAN AND ASSOCIATES, P.C., and for this Motion to Strike Treater Witnesses or for an Order Allowing their Depositions, state as follows:

1. Plaintiff filed his Complaint in this matter on July 7, 2011 [**Dkt. No. 1**], and an Amended Complaint on September 13, 2011 [**Dkt. No. 37**].
2. On July 9, 2012, the Court ordered Plaintiff to answer the PHS Defendants' discovery within 21 days [**Dkt. No. 82**].
3. Per the Court's Order dated July 9, 2012 [**Dkt. No. 82**], the deadline for Plaintiff to serve his responses to **Dkt. No. 72-2** was July 30, 2012.
4. Plaintiff failed to comply with the Court's Order dated July 9, 2012 [**Dkt. No. 82**].
5. The PHS Defendants filed a Motion to Dismiss as Discovery Sanction [**Dkt. No. 90**].

6. Plaintiff failed to file a response to the Motion to Dismiss as Discovery Sanction, and the Motion remains pending [**Dkt. No. 90**].

7. Subsequent to the filing of the PHS Defendants' Motion to Dismiss as Discovery Sanction, Plaintiff served untimely and inadequate responses to the ordered discovery. (**Exhibit A**).

8. Plaintiff's counsel ignored PHS Defendants' counsel's request to supplement the discovery responses. (**Exhibit B**).

9. Counsel for the PHS Defendants requested records from all of the medical treaters that Plaintiff identified in his untimely and inadequate discovery responses; however, due to the inexcusable delay caused by Plaintiff's violation of this Court's Order [**Dkt. No. 82**], counsel has received only some of the treaters' records to date—and discovery ended on October 9, 2012.

10. Defense counsel deposed Plaintiff on October 4, 2012.

11. In his deposition, Plaintiff testified as to what he believes his treaters' opinions are regarding the care that he received in prison¹. To adequately defend this matter, PHS Defendants must determine what Plaintiff's treaters' opinions are.

12. Plaintiff further testified that he does not know whether he has retained or will retain any expert witnesses in this case.

13. Plaintiff's answers to the PHS Defendants' Expert Interrogatories to Plaintiff were due to be served no later October 8, 2012. Counsel for the PHS Defendants has not received them to date. (**Exhibit C**).

¹ Plaintiff's deposition transcript is not yet available.

14. On May 22, 2012, the PHS Defendants filed a Motion for Disclosure Order or Qualified Protective Order Pursuant to HIPAA [**Dkt. No. 78**]. Plaintiff did not file a response to the Motion. It remains pending.

15. With discovery closed, and absent a Disclosure Order or Qualified Protective Order Pursuant to HIPAA, the PHS Defendants have no means of determining what Plaintiff's treaters' testimony might be in this case.

16. Absent court intervention, the PHS Defendants will be prejudiced by Plaintiff's delays, violation of this Court's Order, and inadequate discovery responses [**Dkt. No. 82**].

17. Counsel for PHS Defendants sought concurrence with the relief requested herein prior to filing this Motion, but concurrence could not be obtained.

WHEREFORE, the PHS Defendants respectfully request that this Honorable Court grant this Motion and (1) enter an order striking Plaintiff's post-incarceration medical treaters as witnesses in this matter (including but not limited to: Charles Kershner, M.D.; Jeffrey Kachmann, M.D.; Ann Michelle Webb, F.N.P.; representatives of Lutheran Hospital of Indiana; and representatives of Marion General Hospital); or in the alternative, (2) enter an order allowing the PHS Defendants to take the depositions of the medical treaters and extending the dispositive motion deadline until after such depositions are taken. Defendants further request that the Court award any and all such further and other relief as this Court deems just and equitable.

Respectfully submitted,
CHAPMAN AND ASSOCIATES, P.C.

Dated: October 11, 2012

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**BRIEF IN SUPPORT OF THE PHS DEFENDANTS' MOTION TO STRIKE TREATER
WITNESSES OR FOR AN ORDER ALLOWING THEIR DEPOSITIONS**

PROOF OF SERVICE

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EXHIBIT B PHS Defendants' Counsel's Request for Supplemental Answers to Discovery Requests

EXHIBIT C PHS Defendants' Expert Interrogatories to Plaintiff

STATEMENT OF ISSUES PRESENTED

WHETHER, AS A DISCOVERY SANCTION, THE COURT SHOULD STRIKE PLAINTIFF'S POST-INCARCERATION MEDICAL TREATERS AS WITNESSES OR IN THE ALTERNATIVE, WHETHER THE COURT SHOULD ALLOW DEFENDANTS TO DEPOSE THEM AFTER THE CLOSE OF DISCOVERY.

Defendants Answer: YES.
Plaintiff Answers: NO.

CONTROLLING/APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

Fed. R. Civ. P. 37(b)(2)(A)(v) provides that a Court may dismiss an “action or proceeding in whole or in part” when a party fails to obey an order to provide discovery. Fed. R. Civ. P. 37 also provides for lesser sanctions in the event that the Court chooses not to dismiss.

The rationale behind the Court's power to impose severe sanctions against a non-complying party under Rule 37 is not merely to penalize, but to act as a deterrent. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43; 96 S.Ct. 2778; 49 L.Ed.2d 747 (1976).

STATEMENT OF RELEVANT FACTS

Plaintiff filed his Complaint in this matter on July 7, 2011 [**Dkt. No. 1**], and an Amended Complaint on September 13, 2011 [**Dkt. No. 37**]. On July 9, 2012, the Court ordered Plaintiff to answer the PHS Defendants' discovery within 21 days [**Dkt. No. 82**]. Per the Court's Order dated July 9, 2012 [**Dkt. No. 82**], the deadline for Plaintiff to serve his responses to **Dkt. No. 72-2** was July 30, 2012. Plaintiff failed to comply with the Court's Order dated July 9, 2012 [**Dkt. No. 82**]. The PHS Defendants filed a Motion to Dismiss as Discovery Sanction [**Dkt. No. 90**]. Plaintiff failed to file a response to the Motion to Dismiss as Discovery Sanction, and the Motion remains pending [**Dkt. No. 90**].

Subsequent to the filing of the PHS Defendants' Motion to Dismiss as Discovery Sanction, Plaintiff served untimely and inadequate responses to the ordered discovery. (**Exhibit A**). Plaintiff's counsel ignored PHS Defendants' counsel's request to supplement the discovery responses. (**Exhibit B**). Counsel for the PHS Defendants requested records from all of the medical treaters that Plaintiff identified in his untimely and inadequate discovery responses; however, due to the inexcusable delay caused by Plaintiff's violation of this Court's Order [**Dkt. No. 82**], counsel has received only some of the treaters' records to date—and discovery ended on October 9, 2012.

Defense counsel deposed Plaintiff on October 4, 2012. In his deposition, Plaintiff testified as to what he believes his treaters' opinions are regarding the care that he received in prison². To adequately defend this matter, PHS Defendants must determine what Plaintiff's treaters' opinions are. Plaintiff further testified that he does not know whether he has retained or will retain any expert witnesses in this case. Plaintiff's answers to the PHS Defendants' Expert

² Plaintiff's deposition transcript is not yet available.

Interrogatories to Plaintiff were due to be served no later October 8, 2012. Counsel for the PHS Defendants has not received them to date. (**Exhibit C**).

On May 22, 2012, the PHS Defendants filed a Motion for Disclosure Order or Qualified Protective Order Pursuant to HIPAA [**Dkt. No. 78**]. Plaintiff did not file a response to the Motion. It remains pending. With discovery closed, and absent a Disclosure Order or Qualified Protective Order Pursuant to HIPAA, the PHS Defendants have no means of determining what Plaintiff's treaters' testimony might be in this case. Absent court intervention, the PHS Defendants will be prejudiced by Plaintiff's delays, violation of this Court's Order, and inadequate discovery responses [**Dkt. No. 82**].

Counsel for PHS Defendants sought concurrence with the relief requested herein prior to filing this Motion, but concurrence could not be obtained.

LEGAL STANDARD

Fed. R. Civ. P. 37(b)(2)(A)(v) provides that a Court may dismiss an "action or proceeding in whole or in part" when a party fails to obey an order to provide discovery.

The rationale behind the Court's power to impose severe sanctions against a non-complying party under Rule 37 is not merely to penalize, but to act as a deterrent. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43; 96 S.Ct. 2778; 49 L.Ed.2d 747 (1976).

LEGAL ARGUMENT

Dismissal with prejudice of Plaintiff's claims against the PHS Defendants as a discovery sanction pursuant to Fed. R. Civ. P. 37(b)(2)(A)(v) is more than justified. *See also National Hockey League v. Metropolitan Hockey Club, Inc.* at 642-43. However, in the event that the Court chooses not to grant the PHS Defendants' Motion to Dismiss as Discovery Sanction [**Dkt.**

No. 90], PHS Defendants request that the Court at least provide the lesser relief sought in this Motion, which also would serve as an appropriate sanction pursuant to Fed. R. Civ. P. 37.

As the result of Plaintiff's delays, violation of this Court's Order [**Dkt. No. 82**], and untimely and inadequate discovery responses, the PHS Defendants have been prejudiced: Discovery has ended, and dispositive motions are due on November 9, 2012, yet Defendants (through no fault or delay of their own) still do not have all of Plaintiff's treaters' records in their possession, nor do they know what those treaters' testimony in this case might be, nor do they know whether Plaintiff has retained any expert witnesses. Due process and justice require that the Court intervene to rectify this prejudicial situation that Plaintiff has created.

CONCLUSION

Plaintiff's shocking disregard for the Order of this Court [**Dkt. No. 82**] and for the Federal Rules of Civil Procedure regarding discovery warrant dismissal with prejudice of the entirety of Plaintiff's claims against the PHS Defendants. However, in the event that this Court chooses not to dismiss, the PHS Defendants request that this Motion at least be granted.

WHEREFORE, the PHS Defendants respectfully request that this Honorable Court grant this Motion and (1) enter an order striking Plaintiff's post-incarceration medical treaters (including but not limited to: Charles Kershner, M.D.; Jeffrey Kachmann, M.D.; Ann Michelle Webb, F.N.P.; representatives of Lutheran Hospital of Indiana; and representatives of Marion General Hospital) as witnesses in this matter; or in the alternative, (2) enter an order allowing the PHS Defendants to take the depositions of the medical treaters and extending the dispositive motion deadline until after such depositions are taken. Defendants further request that the Court award any and all such further and other relief as this Court deems just and equitable.

Respectfully submitted,
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Dated: October 11, 2012

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PROOF OF SERVICE

I hereby certify that on October 11, 2012, I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein and I hereby certify that I have mailed by US Postal Service the document to the involved non participants.

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